

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)



Issue Date: 22 March 2005

Case No. 2004 LHC 00629
2004 LHC 00634

OWCP No. 6-188783
6-192595

In the Matter of

BENJAMIN ROBINSON,
Claimant
v.

COASTAL GREAT SOUTHERN,
Employer,
and

AIG CLAIMS SERVICES, INC.,
Carrier

Appearances:

E. Paul Gibson, Esq., for Claimant
Nancy Bloodgood, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves two claims for compensation under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (Hereinafter referred to as the "Act"). In his first claim (OWCP No.6-188783 and Case No. 2004 LHC 00629), the Claimant, Benjamin Robinson, seeks temporary total disability due to injuries alleged to have been suffered by Claimant in a work accident which occurred on July 3, 2002. The Claimant alleges that he injured his **right shoulder, neck and hands** while slinging a sledgehammer on July 3, 2002. The Employer agreed that Claimant injured his **right shoulder and neck** on July 3, 2002 and has paid Claimant temporary total disability benefits through July 6, 2003. However, Claimant asserts that he also has a hand injury and remains temporarily totally disabled as a result of these injuries through the present and continuing.

In his second claim (OWCP No. 6-188783 Case No. 2004 LHC 00634) the Claimant originally asserted that “Claimant became aware of occupational asthma on 7/11/03.” (Form LS-18 dated November 24, 2003). The Claimant subsequently submitted an amended Form LS-18 for the second claim, which asserts that “Claimant became aware of occupational bronchitis and asthma on 7/11/03.” (Amended Form LS-18 dated July 30, 2004). The two claims were referred by the Director, Office of Workers’ Compensation Programs to the Office of Administrative Law Judges on December 19, 2003 for a formal hearing in accordance with the Act and the regulations issued thereunder. These cases were assigned to this Judge and consolidated for a single hearing.

A formal hearing was held on August 11, 2004. (TR. at 1)¹. Claimant submitted 24 exhibits, identified as CX 1- CX 24. Employer objected to Claimant’s exhibits 11, 12 and 18, but those objections were overruled at the hearing. (TR. at 23). Additionally, the parties agreed to the submission of Claimant’s exhibits 25, 26 and 27 post-hearing. Employer submitted 40 exhibits, EX 1 through EX 40, and Exhibits 1 – 19 and 21 – 40 were admitted into the record. Exhibits 15 and 22 were admitted over Claimant’s objections. (TR. at 27 - 30). Employer’s exhibit 20 was excluded upon objection by Claimant. (TR. at 28). The record was held open for 60 days for the submission of post-hearing briefs. (TR. at 144). Claimant submitted his brief on November 3, 2004. Employer submitted its brief on November 5, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant has a compensable occupational lung disease under the Act;
2. Whether Claimant has a compensable carpal tunnel hand injury under the Act;
3. Whether Claimant is entitled to reimbursement for medical care received from Dr. Shealy, Dr. Fechter, Dr. Obong and Dr. Joye; and
4. Whether Claimant is entitled to additional disability benefits due to accidental injuries sustained on July 3, 2002, for the period from July 7, 2003, through the present and continuing.

¹ TR – Transcript; CX – Claimant’s exhibits; EX – Employer’s exhibits.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:²

1. The Act applies to this claim;
2. The employer/carrier has paid all medical bills and costs associated with the claimant's July 3, 2002 injury to his shoulder and neck;
3. The employer/carrier paid Temporary Total Disability payments to the claimant from the date of his injury on July 3, 2002 until July 6, 2003 when an LS-207 was filed;
4. On May 29, 2003, the claimant was found to have reached MMI for the injury to his neck and was assigned a 5% impairment rating by his physician of choice, Dr. Khoury. He remains under care for this injury;
5. On August 14, 2003, the claimant was found to have reached MMI for the injury to his shoulder and was assigned an 8% impairment rating by his physician of choice, Dr. McIntosh. He remains under care for this injury;
6. The claimant has continued to receive medical treatment for pain associated with these injuries, which all has been provided by the employer/carrier;
7. The physicians authorized by the employer/carrier to treat the claimant are Dr. McIntosh, Dr. Khoury, and Dr. Fechter;
8. The physicians who were authorized to perform Independent Medical Evaluations on the claimant are Dr. Mitchell, Dr. Pacult, and Dr. Duc;
9. Dr. Joye, Dr. Obong, and Dr. Shealy have not been authorized by the employer/carrier to treat the claimant;
10. The claimant has not moved to change his authorized treating physician, but has requested care for his hand injury by Dr. Shealy;
11. The claimant was permanently suspended from his industry on July 7, 2003 and filed a grievance. His permanent suspension was lifted on June 9, 2004 by action of the South Atlantic Dock and Marine Council.
12. At the time of his injury, Claimant had an average weekly wage of \$1,327.84 per week which would yield a compensation rate of \$885.23.³

² JX 1.

³ JX 2. This joint stipulation was reached as the result of a telephone conference held on February 2, 2005. A letter confirming the stipulation was submitted by Counsel for the Claimant, and is identified as JX 2.

DISCUSSION OF LAW AND FACTS

As noted earlier, this decision addresses two claims for compensation. The testimony, medical evidence and vocational evidence in the record is summarized as follows:

Testimony of Claimant

Claimant is a forty-five year old male. Claimant testified that though he only completed through the 11th grade of high school, he was able to earn his GED and also participated in Job Corps. (TR. at 33). Claimant completed his welding certificate via Job Corps. (TR. at 34).

After working in various welding positions, Claimant obtained employment with the Longshoremen in Local 1422-A and began his work from Employer. (TR. at 35). In his testimony, Claimant described the type of work he would generally do in this position on behalf of Employer:

[W]e would carry containers. We carry chassis, we do brake shoes, we weld, burn, grind, paint, burn paint, we clean up toxic material that has been rusted in the containers, blow out white particles in the boxes. [...] We pull containers, we pull chassis, we break down and build up tires.

(TR. at 36). Claimant explained that “pulling containers” means “mov[ing] them around to where we can work on them.” (TR. at 36). Claimant noted that he also engaged in welding, cutting and painting in this position. (TR. at 37-8). Claimant testified that his Union is not involved in loading or unloading the ships. (TR. at 37).

Claimant testified that a majority of the work he was involved in for Employer was performed outside. (TR. at 37). However, Claimant noted that his work often required him to go inside containers, where he would be exposed to dust or debris. (TR. at 37). Claimant testified that he was also exposed to welding fumes, cutting fumes, painting fumes and brake dust. (TR. at 38).

Claimant testified that Employer provided him with a particle mask to wear during his work. (TR. at 38). Claimant explained that these masks were similar to paper masks available for purchase at Lowes. (TR. at 38). Claimant noted that Employer did not provide him with any other respirator or breathing equipment. (TR. at 39).

Claimant testified that he suffered a work-related injury on July 3, 2002. (TR. at 40). Claimant explained that he was using a sledgehammer, and the “whole thing just swung back” on him, injuring his neck and shoulder. (TR. at 40). Claimant reported the injury to Employer, and was referred by Employer to Dr. Connelly. Dr. Connelly then referred Claimant to Dr. McIntosh, a specialist in orthopedic medicine. (TR. at 41.)

Claimant testified that he initially received injections in his shoulder by Dr. McIntosh. Eventually, he underwent surgery on his shoulder to repair his rotator cuff. (TR. at 43).

Claimant also consulted Dr. Khoury regarding the pain in his neck. Claimant noted that an MRI revealed three swollen disks in his neck, and that he was prescribed pain medication. (TR. at 43). Claimant has never been recommended surgery by a physician for his neck injuries. (TR. at 66).

Claimant testified that he was informed that he could return to work on July 6, 2003. (TR. at 44). Claimant noted that Dr. McIntosh gave him a thirty-pound weight restriction upon his release. (TR. at 44-5). Claimant testified that his previous job with Employer would exceed this restriction, as it required him to lift things that weighed more than thirty pounds. (TR. at 45). Claimant explained:

I had to do floor jobs. I had to handle floor boards, probably about 80 pounds, because it is 21 plywood. We had eight foot and ten foot sheets.

(TR. at 45). Claimant also noted that the plywood he would put in the floor would weigh more than thirty pounds. Claimant further stated that cross members at the bottom of containers, weighed more than thirty pounds. Claimant stated that when he was working on the chassis, the wheel that had to be pulled off “weighed like a hundred pounds.” (TR. at 46). Claimant testified that doing brake jobs and changing tires on a tractor trailer required lifting over 30 pounds. (TR. at 46).

Claimant testified that the last day he worked for Employer was July 3, 2002. (TR. at 41). Claimant noted that he received temporary federal payments from Employer in the amount of \$666.70 a week until July 6, 2003, the date he was released to work by Dr. McIntosh. (TR. at 42).

Claimant testified that, upon his medical release by Dr. McIntosh, he attempted to return to work on July 7, 2003, under the assumption that Employer would provide him work that would not exceed his thirty pound weight restriction. (TR. at 47). Claimant noted when he arrived at work, he was asked by management of Employer to take a drug test. (TR. at 48). Claimant stated that he told management to contact his Shop Steward, as he felt that he should not have been required to take a random drug test. Claimant explained that he was under the impression that his three-year probation resulting from an earlier failed drug test had expired. (TR. at 48). Claimant testified that he nonetheless informed the Shop Steward that he was willing to take a drug test. (TR. at 75).

While Claimant’s Shop Steward was attempting to contact the President of Employer, Claimant testified that he was informed, presumably by a member of management, that they interpreted his actions as a refusal to take a required urinalysis test. (TR. at 48). Regardless of this, Claimant noted that he was given a job by Employer, which he was unable to complete. (TR. at 48). Claimant explained that he was given a broom and told to sweep, but he was unable to do so because of pain in his shoulder and neck. (TR. at 90). Claimant testified that he was then terminated by Employer, who based this action on Claimant’s refusal to take a drug test. (TR. at 49). Claimant testified that he never actually refused to take the drug test. (TR. at 49).

Claimant testified that he filed a grievance with the Union alleging that Employer improperly fired him for failing to submit to a drug test. Claimant stated that this grievance procedure was eventually resolved, and he was granted all his benefits, and was allowed back to his employment with Employer. (TR. at 49). Claimant agreed that the Union told him that he could return to work if he passed a drug test. (TR. at 91). Claimant did eventually take a drug test, and passed; however, he did not return to work. (TR. at 91). Claimant explained that he couldn't, because at that time, Dr. Duc and Dr. Fechter had not yet released him for work. (TR. at 93).

Claimant testified that he was eventually referred to a pain doctor for assistance in managing the pain in his neck and shoulder. (TR. at 50). Claimant originally consulted Dr. Joye, but later pursued treatment with Dr. Duc. (TR. at 50). Claimant explained the switch by stating that "Employer did not want to pay me for the services that Dr. Joye was giving me." (TR. at 50). Claimant noted that at the time of his testimony, he was still under the care of Dr. Duc. (TR. at 50).

Claimant testified that Dr. Duc had not yet permitted him to return to work. (TR. at 51). In addition to his pain medication prescription, Claimant noted that he also receives injections from Dr. Duc as a part of his pain management therapy. (TR. at 51). Claimant noted that Employer has been paying for this therapy. (TR. at 51).

Claimant testified that he has also received treatment for pain in his hand. (TR. at 52). Claimant noted that he initially consulted Dr. Hyatt, his family doctor, who then referred him to Dr. Shealy. (TR. at 52). Claimant also noted that he had informed Dr. McIntosh of the pain in his hand, but that he did not look at it. (TR. at 67). Claimant testified that a request for care by Dr. Shealy was made to the Employer. (TR. at 52). Claimant noted that he was diagnosed with carpal tunnel syndrome, and underwent reparative surgery on his hand. (TR. at 52). Claimant agreed that this procedure has not help ease the pain in his neck or shoulder. (TR. at 52).

Claimant further testified that after he was initially injured in 2002 and he was out of work, he began to notice that he was having difficulty breathing. (TR. at 53). Claimant thought he merely had a cold, and consulted Dr. Hyatt, who prescribed codeine syrup. (TR. at 53). When this treatment was unsuccessful, Dr. Hyatt referred Claimant to Dr. Fechter, a lung specialist. (TR. at 53). Claimant noted that his first visit with Dr. Fechter was on July 11, 2003, just five days after he had questioned taking the drug test, and Employer had terminated him. (TR. at 54).

Claimant testified that he informed Dr. Fechter of his employment history, and was submitted to a series of breathing tests. (TR. at 55). Claimant noted that Dr. Fechter "had to go into [his] lungs with a camera and what not, and cleared [his] lungs up." (TR. at 55). Claimant noted that although this procedure has improved his coughing, he remains on breathing machines when he sleeps. (TR. at 55). Claimant noted that at the time of testimony, he remained under the care of Dr. Fechter, and that Dr. Fechter would not permit him to return to work unless it was to a clean environment. (TR. at 56).

Claimant testified that Employer did not provide him a clean work environment. (TR. at 56). In explanation, Claimant noted:

The welding, the burning, the mechanical parts of brake jobs, sweeping and blowing dust and burning – the paint itself is not clean.

(TR. at 61). Claimant agreed on cross that he does not know what is in the dust, or whether or not it is toxic. (TR. at 61-2). Claimant further noted that he does not know if there are any hazardous materials in the containers for which he was responsible for cleaning out. (TR. at 64). Nonetheless, Claimant state that the felt that the dust was toxic, though he had no reports or evidence to support this claim. (TR. at 71). Claimant also testified that he felt that the fumes that came from the truck were toxic. (TR. at 72). However, Claimant stated on cross that he worked out of a truck for only five to ten minutes a day, and that it was run by gas, not diesel. (TR. at 72). Claimant also testified that he believed there were asbestos at his job site for Employer. (TR. at 76).

Claimant additionally stated that he used to smoke, but had quit, and that this cessation did not improve his lung problem. (TR. at 57). Claimant noted that his decision to quit was prompted by Dr. Fechter's advice that he should stop in 2003. (TR at 78).

Claimant testified that he is currently not working, and relies on his girlfriend for support. He additional receives money from Union Pension Disability, and has applied for Social Security. (TR. at 57).

Testimony of Claimant's Co-workers

Deposition of Bobby Holden

Mr. Holden was employed as president of Employer for eighteen years, until he was laid off in 2004. (EX 3-4). Mr. Holden noted that during that time, he was responsible for supervising Claimant's manager. (EX 3-5).

Mr. Holden described the job responsibilities of a container mechanic as "replace the flooring, weld holes in them, [and] straighten dents [. . .]" (EX 3-6). Mr. Holden further noted that all of this work is performed outside. (EX 3-6). Mr. Holden agreed on cross that welding generates fumes, and welders don't wear any special breathing gear. (EX 3-31). Mr. Holden testified that container mechanics are provided with aspirators when they are blowing out the containers. (EX 3-31).

Mr. Holden testified that Employer instituted safety policies and procedures, of which training was available for all of Employer's employees. (EX 3-6). Mr. Holden explained that monthly safety meetings were held to discuss potential hazards in the industry. (EX 3-7). Mr. Holden noted that these meetings provided an opportunity for all employees to report anything that they felt was unsafe. (EX 3-7). Mr. Holden testified that, despite this opportunity, Claimant never complained of any hazardous conditions associated with his work. (EX 3-7).

Additionally, Claimant never complained of fumes or gases or poisons in the air. (EX 3-8). Mr. Holden further noted that none of his employees complained of such conditions during his eighteen year tenure with Employer. (EX 3-8).

Mr. Holden testified that Claimant was bound by the Union's collective bargaining agreement, which in turn bound him to the Union's policy on drug use. Mr. Holden explained, "[I]f a mechanic tests positive for illegal drugs, the first offense he's suspended for 90 days unless he submits to a 30-day treatment program, then he can come back in 30 days." (EX 3-9). Upon completion of either one, the employee would then be subjected to random drug testing for three years. Mr. Holden explained, "If he is tested positive within that three-year period then he is suspended for a year. If he submits to yearly treatment program and is tested negative for 12 consecutive months then he can apply for reinstatement to the industry." (EX 3-10).

Mr. Holden testified that Claimant had previously violated the drug policy, and had been suspended for ninety days. (EX 3-10). Mr. Holden noted that when Claimant returned to work, he signed a letter containing stipulations agreeing that he would be subjected to random drug testing for the next three years. (EX 3-11). During his testimony, Mr. Holden read explicitly from the letter that Claimant signed upon his return to work in March of 2001:

The undersigned has been permanently suspended from employment as a mechanic by reasons of having violated the drug policy of the maintenance and repair agreement. Under the third chance clause in the current contract and as a condition of reinstatement the undersigned agrees that he will submit to random drug screen tests. He realizes that if he is again found in violation of this drug policy his permanent suspension from the industry will be reinstated.

(EX 3-11). Mr. Holden noted that by signing this letter, Claimant acknowledged that he was on his third strike. (EX 2-23).

Mr. Holden testified that he was aware that Claimant had injured his shoulder on July 3, 2002. Claimant returned to work with a 30-pound lifting restriction. (EX 3-33). Mr. Holden explained that employees with such restrictions are instructed to procure assistance if they have to lift anything that exceeds their restrictions. (EX 3-34). Mr. Holden agreed that there many tasks in the industry that would require Claimant to lift over thirty pounds. (EX 34).

Concerning Claimant's return to work following this injury on July 7, 2003, Mr. Holden testified that he informed Mr. Langdon that Claimant would have to undergo a drug test upon his arrival. (EX 3-12). Mr. Holden stated that when Mr. Langdon approached Claimant about submitting to the drug test, "[Claimant] informed him that he didn't believe he had to, that his three years' probation was up." (EX 3-13). Mr. Langdon informed Mr. Holden that the president of the Union was being contacted to confirm whether the probationary period had expired. Mr. Holden noted that Claimant was asked a second time to submit to the drug test, and again refused. Nonetheless, Mr. Holden noted that "in the spirit of cooperation" he permitted Claimant to undertake a work assignment while they waited for a response from the president of the Union. (EX 3-15). However, Mr. Holden testified that he knew Claimant was still under the

three-year probationary period because he signed a letter in March of 2001 acknowledging that he was on his third strike. (EX 3-23).

Mr. Holden noted that he waited for approximately one and one-half hours to hear from the president of the Union, but then decided to send Claimant home for refusing to take a drug test. (EX. 3-25). However, prior to this occurring, Mr. Holden was informed that Claimant was in pain, and could not carry out his work assignment. (EX 3-15). Mr. Holden never informed Claimant that he would be terminated for failing to submit to the drug test. (EX 3-16). Mr. Holden testified that the Shop Steward should be aware that Claimant would be fired for failing to take the drug test, though Mr. Holden agreed that he never specifically informed the Shop Steward of this fact. (EX 3-26).

Later in the day, Mr. Holden spoke with the president of the Union, who concurred that Claimant should have taken the drug test. (EX 3-16). Thus, Mr. Holden concluded, “[I]n view of the fact being that we asked him twice to take the drug test, I am now suspending him from the industry.” (EX 3-16).

Jeff Loucks

Mr. Loucks is employed as the President and Directing Manager of Employer. (TR. at 97). Mr. Loucks testified that he has been in the industry for approximately twelve years. (TR. at 97). However, he has been with Employer for only one year, and was not employed at the time when Claimant was originally injured. (TR. at 103).

Mr. Loucks testified that there are neither asbestos nor white powder asbestos in the containers that Employer repairs and cleans. (TR. at 97). Mr. Loucks further noted that the containers Employer contracts to clean do not contain any hazardous materials. (TR. at 98). Mr. Loucks explained:

I know there is not hazardous materials in the units that we clean because that is subcontracted prior to our receiving those containers by the steamship lines, to special hazardous material cleanup crew. You will see fumigation areas on all of the ports, subbed away from all the other containers, where these containers are cleaned and certified as fumigated.

(TR. at 98). Mr. Loucks agreed that there would “be no circumstance in which any employee of [Employer] would ever be cleaning out containers with hazardous materials in them. (TR. at 98). Mr. Loucks explained on cross that once a container holds hazardous materials, it is placarded. This placard is only removed once that container has been fumigated. (TR. at 104).

Mr. Loucks testified that almost all of the stains on the plywood in the containers come from “motor oil or just basic dirt from the crews going in and out.” (TR. at 98). However, Mr. Loucks agreed on cross that he does not have a document specifically identifying the contents of these stains. (TR. at 106). Mr. Loucks testified that marker removal and degreasers are used at Employer. (TR. at 110). However, Mr. Loucks noted that none of these cleaners contain

acetone. (TR. at 99). Mr. Loucks testified that container mechanics employed by Employer are not exposed to diesel fumes, as all of the mobile trucks are gas powered. (TR. at 99).

Mr. Loucks testified that employees are supplied with masks when they sweep or blow out the dust in the containers, although the employees are not required to wear these masks. (TR. at 99). Mr. Loucks explained that there is “no OSHA requirements to wear the respirator masks.” (TR. at 99-100).

Mr. Loucks agreed on cross that there is a minor amount of fumes from welding or burning in the working environment of Employer. (TR. at 109). Employees may also be exposed to painting fumes. (TR. at 110). Mr. Loucks further testified that, to a small degree, employees of Employer may be exposed to heat, cold, dust, fumes and chemicals. (TR. at 111). However, Mr. Loucks stated that an employee of Employer would not be exposed to these elements any more so than they would be at home, although Mr. Loucks agreed on cross that he does not weld inside of his home. (TR. at 113).

Mr. Loucks testified that during his twelve years in the industry, he had never had an employee complain of breathing problems because of employment-related dust. (TR. at 100-1). Likewise, he had never received complaints from any employee who thought he or she was breathing hazardous or toxic fumes while cleaning out the containers. (TR. at 101). Mr. Loucks additionally noted that through his conversations and contacts with the managers of the other ports, he has not learned of any other allegations that begin a container mechanic can lead to pulmonary problems. (TR. at 102).

Mr. Loucks testified that the main job responsibilities of a container mechanic are performed outside. Additionally, while performing his or her job responsibilities, a container mechanic is not exposed to a large level of cleaners, perfume, smoke or toxic fumes. (TR. at 103).

Joel Langdon

Mr. Langdon has been employed by Employer since November of 2000. (TR. at 114). Mr. Langdon started his employment as a power mechanic, and was later promoted to supervisor. (TR. at 114).

Mr. Langdon testified that he is familiar with the position of container mechanic. (TR. at 115). Mr. Langdon noted that container mechanics neither use acetone or cleansing solvents nor clean out containers containing hazardous materials. Mr. Langdon further noted that container mechanics are provided masks, similar to those that can be purchased at Lowes. (TR. at 115, 125). Mr. Langdon explained that a container possessing a hazardous material placard will not be permitted onto the terminal. (TR. at 116). Additionally, Mr. Langdon stated that container mechanics are not exposed to diesel fumes, and that he has never received a report of a container mechanic becoming ill after being exposed to fumes inside of a truck. (TR. at 115).

Mr. Langdon testified that during his time with Employer, he has never had an employee complain of smoke, toxic fumes or chemicals. Mr. Langdon explained that if such complaint had

been made, work would be stopped, and he would investigate through the customer that had been using the container about what the specific container contained. (TR. at 119). Mr. Langdon also noted that a container mechanic is not exposed to diesel fumes in their trucks. However, Mr. Langdon agreed on cross that other equipment in the area uses diesel fuel, and employees may be subjected to such fumes on a daily basis. (TR. at 124). Mr. Langdon additionally testified that an employee has never complained to him of asbestos or breathing problems. (TR. at 119-20).

Mr. Langdon testified that he was present the day Claimant returned to work following his neck and shoulder injury. (TR. at 120). Mr. Langdon stated that he was informed by the Mr. Loucks that upon Claimant's arrival, he was to be drug tested. (TR. at 120). Mr. Langdon testified that Claimant was present when he informed the Union Representative of this fact, and Mr. Langdon felt certain that Claimant heard that he was going to be drug tested. (TR. at 121). Mr. Langdon stated that Claimant said that he felt he did not have to take a drug test, prompting Mr. Langdon to contact his supervisor. (TR. at 121). Mr. Langdon noted that he informed Claimant that if he did not get in his vehicle to go take the drug test, Employer would consider it a refusal, and terminate him. (TR. at 128). Mr. Langdon testified that Claimant never informed him that he would in fact take the drug test. (TR. at 122).

Mr. Langdon testified that he was aware that Claimant filed a grievance, and was recently permitted to return to work. Mr. Langdon noted that Employer "sent a letter to the Union Hall and asked them to present [Claimant] for work, subsequent to his passing of the final offer to take a drug test, which he did pass." (TR. at 123). However, Mr. Langdon noted that Claimant never returned to his employment and, as a result, was subsequently terminated by Employer. (TR. at 123).

Mr. Langdon testified on cross that everyone working at Employer could be exposed to cold, dust, fumes and chemicals. (TR. at 126).

Medical Evidence: Claimant's Neck, Shoulder and Hand

Medical Records of Dr. Gerard Shealy

Dr. Shealy is a member of Charleston Hand Group, and evaluated Claimant on August 8, 2003. (CX 12). Dr. Shealy's notes from this initial evaluation state that Claimant was referred by Dr. Betty Antia-Obong for problems with his right hand. (CX 12). Dr. Shealy's notes further elaborate:

Specifically, he has experienced problems with numbness and tingling in the hand as well as weakness and clumsiness. He relates a history of sustaining an injury to his right upper extremity in July of 2002. At that time, while at work, hammering the roof of a container, he states that the hammer slipped and he sustained an injury to his right arm including his shoulder. He was seen by Dr. McIntosh and underwent evaluation. He subsequently underwent repair of the rotator cuff in September, 2002. He returned to work, however has noted

persistent weakness and pain in his right hand. He has been unable to return to his full duty status and is therefore is presently on a limited duty status.

(CX 12). Dr. Shealy's initial impression was that Claimant suffered from "Possible right lunar neuropathy, carpal tunnel syndrome." (CX 12). Dr. Shealy recommend that Claimant undergo electrodiagnostic studies.

Dr. Shealy's notes dated September 11, 2003, state that Claimant's electrodiagnostic studies indicated "right median neuropathy consistent with a carpal tunnel syndrome." (CX 12). These notes concluded that "the surgery will be scheduled as an outpatient at his request." (CX 12). Accordingly, Dr. Shealy performed a surgical decompression of the median nerve on Claimant's right hand. (CX 12). Following the surgery, Dr. Shealy assigned a five pound lifting restriction on Claimant's right hand through October 27, 2003. (CX 12). Dr. Shealy permitted Claimant to return to full duty employment on December 19, 2003. (CX 12).

Medical Records of Dr. Khoury

Dr. Khoury initially evaluated Claimant on March 11, 2003, at the request of Employer. (CX 5). Dr. Khoury's notes from this date recorded that Claimant complained of neck and shoulder pain. (CX 5). Dr. Khoury noted that an MRI revealed Claimant had some bulges in his upper spine. Dr. Khoury recommended that Claimant undergo cervical epidural steroid injections.

Dr. Khoury once again evaluated Claimant on May, 29, 2003, following his injection treatment. At this point, Dr. Khoury opined that had "reached maximum medical improvement and has a 5% impairment to his spine." (CX 5). Dr. Khoury released Claimant to work with a thirty pound lifting restriction. (CX 5).

Claimant consulted Dr. Khoury on December 2, 2003, once again complaining of posterior neck pain and pain down his right shoulder. Dr. Khoury felt that surgery was not necessary. However, Dr. Khoury noted that Claimant "will probably need chronic pain treatments for this, although it is not clear these will be of help in any case." (CX 5). After recording that a pain medication was prescribed, Dr. Khoury wrote that he told Claimant "to call back if he wants to come back to see me, otherwise I did not have any further treatment to offer him." (CX 5).

Medical Records of Dr. McIntosh

Dr. McIntosh examined Claimant on July 9, 2002, for pain in his right shoulder, at which time Dr. McIntosh opined that Claimant was suffering from a rotator cuff sprain. (CX 3). Dr. McIntosh performed a subacromial injection, and prescribed Claimant anti-inflammatory medication. (CX 3).

After continuing his treatment with Dr. McIntosh over the course of several visits, Claimant continued to experience pain in his right shoulder. On August 14, 2003, Dr. McIntosh opined:

I do not think that there is anything else we can offer him for his shoulder. I do think he is at MMI for this. I will assign an 8% impairment, but no restrictions, on that extremity.

(CX 3). Dr. McIntosh medically released Claimant to return to work on August 14, 2003. (CX 3).

On January 1, 2004, Claimant once again consulted Dr. McIntosh, complaining of severe pain in his right shoulder. Dr. McIntosh was unable to ascertain the etiology of Claimant's symptoms, and Dr. McIntosh recommended that Claimant continue working with a therapist. (CX 3).

Claimant returned for a follow-up visit with Dr. McIntosh on February 10, 2004, and continued to complain of right shoulder pain. (CX 3). Claimant was given an injection during this visit, but it did not provide him any relief from the pain. Dr. McIntosh further noted that Claimant complained of pain in his neck and hand. Dr. McIntosh concluded:

At this point, I do not think there is anything else I can do for his shoulder. The etiology of his pain is multifactorial and I think a combination of such is probably keeping him from using the arm well. I have no further recommendations. He can pursue a second opinion, which I think would be helpful. I have rated and released him and these will remain unchanged. This is based on the fact of what we saw on the second MRI, which showed that the rotator cuff had healed. We will release him.

(CX 3).

Medical Records of Dr. Joye

Dr. Joye is a board certified pain management specialist, and a member of the Pain Specialists of Charleston. Dr. Joye evaluated Claimant on July 25, 2003. (CX 10). Dr. Joye noted that Claimant complained of "posterior neck pain and right should pain with numbness in his distal right upper extremity into his four digits." (CX 10). Dr. Joye made the following assessment of Claimant:

- 1) Cervicalgia with possible radiculopathy status post rotator cuff surgery
- 2) Also possible facet joint pain.

(CX 10). As treatment, Dr. Joye recommended a medical exercise program under the direct supervision of a physician. Dr. Joye suggested Claimant seek this therapy twice a week. Dr. Joye also felt that Claimant was a candidate for advanced interventional pain management, through which Claimant would receive diagnostic transformaminal epidural steroid injections and possibly a cervical facet joint injection. (CX 10). Dr. Joye noted that Claimant agreed to this treatment, and received a steroid injection on the day of his initial consultation. Dr. Joye's

notes indicated that Claimant was scheduled for a follow-up and possible re-injection a week and a half later. (CX 10).

Medical Records of Dr. Duc

Dr. Duc is a board certified pain management specialist, and is also a member of the Pain Specialists of Charleston. Dr. Duc noted that he was asked to evaluate Claimant on February 2, 2004, at the request of Employer's attorney. After examining Claimant and considering his medical records, Dr. Duc made the following assessment:

- 1) Extremity pain secondary to job related injury. The patient reports that he never experienced any problems like this prior to July 2002.
- 2) Cervicalgia also related to the injury. The patient reports he also had never had similar problems prior to the injury.

(CX 10). Dr. Duc further opined, "[D]ue to the nature of the injury and now that we are working on 18 months, it is highly likely that this patient has reached MMI from a cervicalgia point of view." (CX 10). Dr. Duc made the following recommendations:

- 1) Complete EMG's and nerve conduction studies.
- 2) MRI with gadolinium of the cervical spine
- 3) Follow up with Dr. McIntosh for shoulder problems.

(CX 10). Dr. Duc concluded his report by noted that Claimant was "to return to our clinic for further evaluation and/or repeat injection therapy as needed." (CX 10). Dr. Duc also recommended physical therapy for Claimant. (EX 8). Additionally, Claimant has received cervical facet injections. (EX 8).

On July 20, 2004, Dr. Duc restricted Claimant from working "until further notice." (CX 10). On July 26, 2004, Dr. Duc released Claimant with a 10-20 pound lifting restriction. (CX 10).

Medical Evidence: Occupational Disease⁴

Deposition of Dr. Cary Fechter

Dr. Fechter is a pulmonary medicine specialist. She testified that she specifically sees a lot of occupational bronchitis and occupations asthma. (CX 15-4). Dr. Fechter testified that Claimant was referred for shortness of breath and cough, and that their first consultation was on July 11, 2003. (CX 15-6; 15-7).

Dr. Fechter testified that Claimant underwent a pulmonary test function, and eventually a bronchoscopy was performed because "[Claimant] had such a severe cough which [Dr. Fechter] thought was out of proportion to [Claimant's] exposure history." (CX 15-7). Dr. Fechter noted

⁴ Claimant's original LS-18 alleged that he suffered from "occupational asthma." However, Claimant later filed an amended LS-18 to allege that he suffers from "occupational bronchitis and asthma."

that the bronchoscopy revealed acute inflammatory cells, and that Claimant did have the changes of bronchitis. (CX 15-8). Dr. Fechter opined that Claimant suffers from chronic bronchitis⁵, because Claimant continues to have symptoms while on medication, and has exhibited symptoms for more than two years. (CX 15-8; CX 15-26).

On August 6, 2003, Dr. Fechter specifically diagnosed Claimant with “occupational bronchitis⁶,” which the doctor described as “a bronchitic condition due to his occupation or his work usually related to particles in the air [. . .] that he is exposed to.” (CX 15-22). Dr. Fechter elaborated further:

When I use the term occupational bronchitis I am saying within a reasonable medical certainty that his bronchitis is at least caused in part by his occupation. He also was a smoker earlier, he had stopped by the time he was being to me, that a significant degree of his lung disease I felt was occupational in cause or etiology.

(CX 15-23; 24). Dr. Fechter also stated that “[i]n this case, [Claimant] has occupational bronchitis because he hadn’t even been on the job for a year and still he was coughing and he wasn’t smoking and he temporarily related it to his job.” (CX 15-25). Dr. Fechter testified that while it would be relevant if none of Claimant’s co-workers also suffered from occupational bronchitis, “[i]t would not rule out the possibility that [Claimant] is sensitive to whatever agents are on the job.” (CX 15-24).

Dr. Fechter testified that the pulmonary function testing performed on Claimant from which she reached her conclusion was completed by a registered respiratory therapist (RRT) with an excellent reputation. (CX 15-9). In fact, Dr. Fechter stated that the RRT’s ability to perform the test was “light years better than Dr. Mitchell’s.” (CX 15-9). Dr. Fechter pointed out that Dr. Mitchell did not trust the results of the pulmonary function testing performed by his office. Dr. Fechter testified that she likewise would not have trusted his results, and stated that her results were far more reliable. (CX 13-10).

Dr. Fechter testified that she never spoke with Employer regarding its working conditions. Rather, Dr. Fechter testified that all information concerning Claimant’s working conditions came from Claimant himself. (CX 15-9). Claimant reported to Dr. Fechter during their first consultation that he worked as a Longshoreman. (CX 15-11). Dr. Fechter recorded Claimant’s self-described job description as:

[H]e repaired containers, used an air hose to blow and clean containers almost on a daily basis. He also swept dust and was around chemicals and poisons and he used the quote poisons.

⁵ This is different from “acute bronchitis,” which Dr. Fechter explained was “acute and brief and gets well with antibiotics and bronchodilators.” (CX 15-8). Chronic bronchitis is “defined as two to three months of consistent cough and mucus production.” (CX 15-26).

⁶ Dr. Fechter noted that there is a great overlap between occupational bronchitis and occupational asthma. Dr. Fechter explained, “Asthma is supposed to be rapidly reversible. Bronchitis you have chronic symptoms of cough and mucous. As such [Claimant] had bronchitis, he had long-term symptoms so I called it occupational bronchitis.” (CX 15-25).

(CX 15-13). Dr. Fechter felt certain that Claimant did not work with “poison,” but rather opined that Claimant worked with hydrocarbons that can affect one’s breathing. (CX 15-14). Dr. Fechter was also informed by Claimant that he used an acetylene torch to remove screws from the floors of the containers, and that some of the containers Claimant worked on contained asbestos. (CX 15-14). Dr. Fechter was aware that Claimant had not worked as a Longshoreman for more than a year at the time of his consultation, and the fact that he had ceased working due to a shoulder and neck injury. (CX 15-14). Claimant did not inform Dr. Fechter that he had been medically released to return to work by his orthopedic doctors at the time of their visit. (CX 15-15).

Dr. Fechter testified that Claimant had advised that he had quite smoking cigarettes approximately one year before their visit. (CX 15-16). Dr. Fechter agreed that her opinion of the etiology of Claimant’s lung problems would change if truly he smoked a significantly heavier amount. (CX 15-16). Additionally, Dr. Fechter agreed that her opinion would be affected if Claimant did not in fact work with poisons on a daily basis. (CX 15-16). Finally, Dr. Fechter agreed that if Claimant’s illicit drug use was actually different than what he reported, his credibility as a historian would be diminished. Dr. Fechter was unaware that Claimant had failed previous drug tests. (CX 15-18).

Dr. Fechter testified that occupational bronchitis can go away, particularly when patients don’t smoke and follow their doctor’s order. (CX 15-26). In fact, Dr. Fechter noted that Claimant seems to have improved since their initial consultation. (CX. 15-26).

On July 21, 2004, Dr. Fechter imposed medical restrictions upon Claimant. Specifically, Dr. Fechter noted that Claimant “must not work around ex: heat, cold, dust, fumes, chemical, etc.” (CX 14).

Medical Records of Dr. John A. Mitchell

Dr. Mitchell, a member of Charleston Pulmonary Associates, P.A., evaluated Claimant at the request of Employer. In a correspondence directed towards Employer’s counsel, Dr. Mitchell detailed the results of his evaluation:

I was unable to draw any firm conclusions from his history because he was such a limited historian, as well as from his pulmonary function tests which obviously showed suboptimal effort. I have no evidence that he does have asthma.⁷

(EX 7). Dr. Mitchell further stated that Claimant’s “lungs were perfectly clear on exam.” (EX 7). Dr. Mitchell concluded that Claimant’s “actual status is very difficult to assess given his effort on pulmonary function tests and his history.” (EX 7).

⁷ This letter was drafted before Claimant amended his LS-18 to allege that he is suffering from bronchitis, rather than asthma.

Vocational Testing: Testimony of Jerry George Albert

Mr. Albert is a vocational rehabilitation specialist, and completed a labor market survey on behalf of Claimant on May 24, 2004. (EX 15). In response to a question in the hearing of whether Claimant can actually go back and work as a Longshoreman, Mr. Albert testified:

Well, all I know is that there was initially his desire to want to go back to work with his employer, and that was at the time in which I interviewed him. I also know the employer was willing to have [Claimant] back to work. I also know the physicians involved at that time signed off on a job description, and there was an opportunity to work.

(TR. at 134).

Mr. Albert testified that when Claimant was preparing to return to work, he was able to identify employment, other than longshore work, for which Claimant was qualified. (TR. at 134). Mr. Albert noted that one of the identified jobs included “performing delivery truck driving of containers in the yard, moving containers around the yard.” (TR. at 134). Mr. Albert stated that this position paid \$14 an hour. (TR. at 135).

In conducting his evaluation, Mr. Albert interviewed Claimant and examined Claimant’s past work history and his transfer skills. (TR. at 135-6). Mr. Albert also considered Claimant’s age and educational background. (TR. at 136). Mr. Albert testified that Claimant read at a 2nd grade level, performed math at a 4th grade level, and spelled at a 7 ½ grade level. (TR. at 141). Additionally, Mr. Albert examined Claimant’s medical records and history. (TR. at 136). Mr. Albert testified that he researched the labor market by contacting prospective employers. (TR. at 136).

In his evaluation, Mr. Albert testified that he considered jobs that Claimant could perform both indoors and outdoors. Mr. Albert also considered both positions Claimant could perform if he only had a neck and shoulder injury, as well as positions Claimant could undertake if it is determined that he suffers from an occupation disease that affects his lungs. (TR. at 135). Mr. Albert testified that he came up with several possibilities, some of which he sent to Claimant’s physicians for approval or disapproval. (TR. at 137).

Mr. Albert identified a Marine Container and Chassis Mechanic position that was available within Employer on July 3, 2003. (EX 16). The duties associated with this position included straightening and welding steel containers, cleaning, repair and replace flooring, brake jobs and tire repair/replacements. (EX 17). This job was approved by Dr. Khoury as appropriate for Claimant. (EX 17).

Mr. Albert opined that he located two appropriate jobs which would permit Claimant to work indoors, and both were approved by Dr. Fechter. (TR. at 137). The first was a full-time phone operator position for Target, which paid \$6.50 an hour, and the employer was willing to train. (TR. at 137). The Labor Market Survey completed by Mr. Albert noted that this position was available on May 24, 2004. (EX 15). This full-time position required a high school

graduate who would answer phones and customer questions, give sort patrons tickets in the dressing room and hang shirts/pants on the racks. (EX 15). This position paid \$6.50 an hour. (EX 15).

The second was a full-time dispatcher job for Charleston Marine, and paid \$8.50 and hour. Mr. Albert noted that this position was also approved by Dr. McIntosh of July 15, 2004. (TR. at 138). This potential employer was willing to train a high school graduate to use dispatcher radio equipment. (EX 15).

The Labor Market Survey also listed a hotel front desk clerk position at the Holiday Inn Express and at the Francis Marion hotel. However, Mr. Albert testified that he felt this indoor positions, and that of night auditor in a hotel, were not appropriate for Claimant because of his low math and reading scores. (TR. at 139).

The Labor Market Survey highlighted a full-time dispatcher position that was available with Thompson Companies on May 3, 2004. (EX 14). This potential employer was willing to train new hires, and preferred high school graduates with basic computer knowledge to input information. (EX 15). This position paid \$8.50 and hour.

Per the Labor Market Survey, a sales associate position was available at Luxotica/Sunglass Hut on May 5, 2004. (EX 15). This position required 30 hours a week of work, and paid \$5.25 per hour. This prospective employer prefers high school graduates, and would train a new employee on computerized cash register. (EX 15).

In terms of outdoor positions, Mr. Albert testified that a greeter position was available at M & M Group Auto Care Express, which paid \$6.50 an hour for 30 – 40 hours a week of work. This position was available on September 2, 2003, and required the employee to greet customers of the car wash. (EX 18). The employer was willing to train non-high school graduates, and this position required very minimal lifting. (TR. at 138). Mr. Albert noted that this position was approved by Dr. Duc, Dr. Khoury and Dr. Pacult. (TR. at 138).

Mr. Albert additionally identified a full-time meter reading position for Burmax, which paid \$9 and hour. The job responsibilities of this position include “walking, holding a meter reader that weighs one to two pounds, and working outdoors in all kinds of weather – cold or hot.” (TR. at 139). Mr. Albert noted that this position was approved by Dr. Pacult and Dr. McIntosh as appropriate for Claimant. (TR. at 139).

Mr. Albert sent several positions available with Stephens Shipping and Terminal Co. for approval by Dr. Khoury. This potential employer was located in Savannah, Georgia. (EX 17).

Finally, Mr. Albert testified that he felt that a full-time delivery driver position for Howard Shepard was appropriate for Claimant because he possessed the requisite port working experience and clean driving record. (TR. at 139). This position paid \$14 an hour, and involved relocating freight containers from the shipyard to a local freight yard, using a Hustler vehicle, which an employee would have to climb two steps to enter. (TR. at 139).

Mr. Albert testified that “in all possibility” the aforementioned positions were available on July 7, 2003. (TR. at 142). While Mr. Albert agreed that he did not ask each employer whether the position was open on July 7, 2003, it was “simply [my] understanding that there was turnover and frequent openings.” (TR. at 142). Mr. Albert further agreed that he was unable to ascertain whether the listed wage had changed between the times he spoke with each prospective employer, and July 7, 2003. (TR. at 143).

Mr. Albert agreed on cross that the both the meter reader position and the delivery driver position would expose Claimant to heat, cold, dust and fumes. (TR. at 140). Mr. Albert agreed that these positions were inappropriate per the restrictions created by Dr. Fechter, but fell within the restrictions placed on Claimant by Dr. Mitchell. (TR. at 140).

ANALYSIS

I. Occupational Disease Claim

Section 20(a) Presumption

Section 20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170, 174 (1989), *aff’d*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989). Once the claimant has invoked the presumption, the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935).

In the present case, Claimant has offered substantial evidence that he suffers from bronchitis, based upon the opinion of Dr. Fechter. Claimant testified that he was having difficulty breathing and was referred to Dr. Fechter, a lung specialist. (TR. at 53). He testified that he informed Dr. Fechter of his employment history, and submitted to a series of breathing tests. (TR. at 55). On August 6, 2003, Dr. Fechter specifically diagnosed Claimant with “occupational bronchitis,” which the doctor described as “a bronchitic condition due to his occupation or his work usually related to particles in the air [. . .] that he is exposed to.” (CX 15-22). Thus, I find that, for the purpose of §20, the Claimant has established that he suffers from a physical harm, bronchitis.

Secondly, Claimant must offer substantial evidence that work conditions existed which could have caused his bronchitis. The only such evidence offered by the Claimant is his testimony that the Employer failed to provide him a clean work environment. (TR. at 56). Claimant explained, “The welding, the burning, the mechanical parts of brake jobs, sweeping and blowing dust and burning – the paint itself is not clean.” (TR. at 61). Claimant stated that he felt that the dust was toxic. (TR. at 71). Claimant also testified that he felt that the fumes that

came from the truck were toxic. (TR. at 72). Claimant also testified that he believed there was asbestos at his job site for Employer. (TR. at 76).

Dr. Fechter concurred that the Claimant's work environment could have caused his bronchitis, based upon the description of conditions given to him by the Claimant. Dr. Fechter opined that "within a reasonable medical certainty [Claimant's] bronchitis is at least caused in part by his occupation. (CX 15-23, 24). Dr. Fechter also stated that "[i]n this case, [Claimant] has occupational bronchitis because he hadn't even been on the job for a year⁸ and still he was coughing and he wasn't smoking and he temporarily related it to his job." (CX 15-25).

This evidence, if fully credited, could establish that Claimant's work conditions could have caused or aggravated his bronchitis. Therefore, I find that it is presumed pursuant to §20(a) that the Claimant has a work related occupational bronchitis.

Rebuttal of the §20(a) Presumption

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 273 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71, 77-78 (1991). Substantial evidence is such relevant evidence as a "reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 477 (1951) (citation omitted); see also *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 506, 508 (1951); *Phillips v. California Stevedore & Ballast Co.*, 9 BRBS 13, 14 (1978).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). *Smith v. Sealand Terminal*, 14 BRBS 844, 846 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-145 (1990). The employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the §20(a) presumption. *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, the employer must establish that the claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85, 86 (1986).

Employer first argues that Claimant is not suffering from bronchitis. In support, Employer offers the medical records of Dr. Mitchell, an independent medical examiner. Dr. Mitchell found that Claimant's testing efforts were so suboptimal that it was impossible to ascertain whether or not Claimant had any pulmonary disease. Dr. Mitchell noted that Claimant's pulmonary functions were within a normal range. (EX 7). Thus, Dr. Mitchell

⁸ Claimant had not worked for a year prior to seeing Dr. Fechter.

concluded that there was no evidence that Claimant was suffering from asthma⁹. (EX 7). Because Dr. Mitchell's opinion pre-dates the claim of occupational bronchitis, this evidence cannot be considered substantial evidence that the Claimant does not have bronchitis, but is considered substantial evidence that he does not have asthma.

Employer also argues that Claimant's working conditions could not have caused his lung ailments. In support, Employer offers the testimony of several co-workers to establish that Claimant's former workplace did not contain poisons or toxic fumes that could cause bronchitis. For instance, Mr. Holden testified that during his eighteen years with Employer, not one employee had ever reported that he or she felt that any fumes were poisonous. (EX 3-48) More importantly, Mr. Holden testified that monthly safety meetings were held, and Claimant never complained to him or to any other supervisor, about any possible hazardous conditions association with his work as a container mechanic. (EX 3-48).

Additionally, Employer offers the testimony of Mr. Langdon, who has been employed by Employer since November of 2000 and who started as a power mechanic, and was later promoted to supervisor. (TR. at 114). Mr. Langdon noted that container mechanics do not use acetone or cleansing solvents and do not clean out containers containing hazardous materials. Mr. Langdon explained that a container possessing a hazardous material placard will not be permitted onto the terminal. (TR. at 116). Additionally, Mr. Langdon stated that container mechanics are not exposed to diesel fumes, and that he has never received a report of a container mechanic becoming ill after being exposed to fumes inside of a truck. (TR. at 115). Mr. Langdon additionally testified that during his time with Employer, he has never had an employee complain of smoke, toxic fumes or chemicals. Mr. Langdon explained that if such complaint had been made, work would be stopped, and he would investigate through the customer about what the container contained. (TR. at 119).

Finally, Employer offers the testimony of Mr. Loucks, who is employed as the President and Directing Manager of Employer. (TR. at 97). While Mr. Loucks agreed on cross that there was a minor amount of fumes from welding, burning or painting in the working environment of Employer, Mr. Loucks clearly testified that an employee of Employer would not be exposed to these elements any more so than they would in any other environment. (TR. at 109).

The evidence offered by Employer disputes Claimant's assertion of a hazardous workplace as the catalyst of his lung ailments, thereby controverting the existence of a causal relationship between Claimant's employment and his illness. This evidence, if fully credited, does constitute substantial countervailing evidence which establishes that the claimant's employment did not cause, aggravate, or accelerate his bronchitis. Therefore, I find that Employer has presented sufficient evidence to rebut the §20(a) presumption.

Weighing the Evidence

Once the §20(a) presumption is rebutted, it falls out of the case and the administrative law judge must then weigh all the evidence and resolve the case based on the record as a whole, with Claimant bearing the ultimate burden of persuasion. *Del Vecchio*, 296 U.S. at 286; *Universal Maritime Corporation v. Moore*, 126 F.3d 256, 262 (4th Cir. 1997); *Noble Drilling*

⁹ Dr. Mitchell's conclusion is dated February 12, 2004, before Claimant amended his LS-18 to change his lung disease claim from "occupational asthma" to "occupational bronchitis and asthma."

Co. v. Drake, 795 F.2d 478, 481 (5th Cir. 1986); *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 700 (2d Cir 1982); *Hislop v. Marine Terminals Corp.*, 14 BRBS 927, 931 (1982). This rule is an application of the “bursting bubble” theory of evidentiary presumptions, derived from the United States Supreme Court’s interpretation of Section 20(d) of the Act. *Del Vecchio*, 296 U.S. at 286; see also *Brennan v. Bethlehem Steel Corporation*, 7 BRBS 947 (1978) (applying *Del Vecchio* to §20(a)).

In weighing the evidence relating to whether the Claimant suffers from bronchitis, I accord greater weight to the medical opinion of Dr. Fechter than that of Dr. Mitchell, due to the fact that Dr. Mitchell examined Claimant with the sole purpose of determining whether he was suffering from asthma, not bronchitis. Additionally, Dr. Mitchell acknowledged, and Dr. Fechter concurred that the pulmonary function testing performed by Dr. Mitchell yielded inconclusive results. Therefore, I find that the preponderance of the medical evidence establishes that Claimant suffers from bronchitis.

However, I find that Claimant has failed to establish by a preponderance of the evidence that his bronchitis is aggravated or caused, even in part, by his working conditions under Employer. Dr. Fechter testified that the occupational link she made between Claimant’s employment and his ailment was based solely on a history provided to her by Claimant himself. Dr. Fechter testified that she never spoke with Employer regarding its working conditions. Rather, all information concerning Claimant’s working conditions came solely from Claimant. (CX 15-9).

It is, thus, relevant that Claimant has contradicted himself in his deposition and testimony, casting a shadow of unreliability upon the history he had provided to Dr. Fechter. For instance, Claimant testified during the hearing that he used to smoke, but had quit, and that this did not improve his lung problem. (TR. at 57). Claimant noted that his decision to quit was prompted by Dr. Fechter’s advice that he should stop in 2003. (TR at 78). However, Dr. Fechter testified that “[Claimant] also was a smoker earlier, [but] he had stopped by the time he was being to me.” (CX 15-23; 24). In fact, Dr. Fechter believed that Claimant had ceased smoking entirely for a whole year prior to their visit. (CX 15-24). Dr. Fechter’s July 11, 2003 Pulmonary Report begins with the history that “The patient is a complicated 43-year-old male who has not smoked a cigarette since 3/03 . . .” (CX 14-1). It is important to note that Dr. Fechter testified that her opinion of the cause of Claimant’s lung problems would change if truly he smoked a significantly heavier amount than that to which he admitted. (CX 15-16).

Additionally, Dr. Fechter agreed that her opinion would be affected if Claimant did not in fact work with poisons on a daily basis. (CX 15-16). Claimant has failed to offer any evidence, other than his own unsubstantiated testimony, that the materials he worked with on a daily basis were toxic or harmful to his lungs. Claimant asserted that the dust in the containers was toxic, and that the fumes that came from the truck were toxic. (TR. at 71-72). However, Claimant stated on cross examination that he worked out of a truck for only five to ten minutes a day, and that it was run by gas, and thus did not produce diesel fumes. (TR. at 72).

To the contrary, the Employer offered the testimony of three credible witnesses, Mr. Langdon, Mr. Loucks and Mr. Holden, who each clearly testified that there were no toxic materials in the containers where the Claimant worked. This testimony is supported by Employer’s policy of sending those containers that did previously contain toxic material to

another area for fumigation, and thus never would have been in contact with Claimant. (TR. at 98). Claimant also testified that he believed there was asbestos at his job site for Employer. (TR. at 76). This assertion was again unequivocally disputed by Mr. Loucks, who clearly testified that there is neither asbestos nor white powder asbestos in the containers that Employer repairs and cleans. (TR. at 97).

The Claimant bears the burden proof to establish that working conditions existed which could have caused or aggravated his bronchitis. The Claimant has offered no evidence other than his unsubstantiated testimony that such conditions existed. His testimony is contradicted by multiple credible witnesses that the conditions in which the Claimant worked were not as he testified. Upon consideration of all of the evidence, I find that the Claimant has failed to prove by a preponderance of the evidence that the working conditions he described to Dr. Fechter existed in his workplace under Employer. Dr. Fechter agreed that the absence of such conditions would affect her opinion as to the cause of Claimant's bronchitis. Therefore, Dr. Fechter's opinion that the Claimant's bronchitis is caused by his work environment is entitled to no weight.

Thus, I find that the Claimant has not met his burden to show by a preponderance of evidence that his bronchitis is aggravated or caused even in part by the conditions of his employment. Therefore, his claim for compensation for occupational lung disease must fail.

The Claimant also seeks authorization, and thus reimbursement, of the medical care provided by Dr. Fechter in regards to his lung ailments. However, because I have found that Claimant's lung ailments are not work related, the Employer is not responsible for any related medical treatment.

II. Carpal Tunnel Claim

Section 7(d) Authorization of Medical Services: Dr. Shealy and Dr. Obong

In seeking authorization of the medical care provided by Drs. Shealy and Obong¹⁰, as is a prerequisite for reimbursement for medical expenses, Claimant appears to argue that his carpal tunnel syndrome and subsequent surgery is related to his employment.

As discussed *supra*, §20(a) of the Act provides a claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *Merrill*, 25 BRBS at 144; *Gencarelle*, 22 BRBS at 174, *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989).

First, Claimant has established that he suffered a physical harm. Claimant was affirmatively diagnosed with carpal tunnel syndrome by Dr. Shealy on September 11, 2003. (CX 12). Second, Claimant has established that his work conditions could have caused his carpal

¹⁰ It is uncontroverted that Claimant was referred to Dr. Shealy by his family physicians office. As Claimant testified, his family physician at the time was Dr. JoAnn Hyatt who is partners with Dr. Betty Obong. (EX 1). When Dr. Hyatt was not available, Claimant was seen by Dr. Obong. Dr. Obong referred Claimant to Dr. Shealy, and orthopedic surgeon with the Charleston Hand Group.

tunnel syndrome. Claimant testified that he was injured on July 3, 2002, while working on the roof of a container with a sledgehammer on behalf of Employer, when “the whole thing swung back on [him].” (TR. at 40). Claimant testified that he continued to suffer from persistent pain and weakness in his right hand following this accident. (CX 12). Claimant further noted that he had no hand pain prior to the July 2002 accident. (CX 12). Claimant’s testimony establishes that his work-related accident could have caused his carpal tunnel syndrome in his right hand. Therefore, I find that Claimant has established a prima facie case and the §20(a) presumption has thus been invoked.

Since the presumption has been invoked, the burden now shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant’s employment did not cause, aggravate, or accelerate his condition. *James*, 22 BRBS at 273; *Peterson*, 25 BRBS at 77-78.

In the present case, Employer makes little effort to rebut the presumption that Claimant’s carpal tunnel syndrome is causally related to his employment. Employer’s post-hearing brief merely states, “There is no evidence in the record to indicate that the carpal tunnel surgery had anything to [do] with the admitted shoulder injury,” for which Employer acknowledges responsibility. (Employers Brief at 18). Since this does not rise to the level of substantial countervailing evidence required to establish that Claimant’s employment did not cause his condition, I find that Employer has failed to rebut the presumption Claimant’s carpal tunnel syndrome is therefore causally related to his employment.

Employer nonetheless argues that it should not be required to reimburse Claimant for his wrist surgery and medical care for carpal tunnel syndrome. Where a claimant has demonstrated that he has suffered from a compensable injury under the Act, the employer is required to furnish medical, surgical and other attendant benefits and treatment for as long as the nature of the recovery process requires. 33 U.S.C. § 907. The claimant must establish that medical expenses are related to the compensable injury and are reasonable and necessary. *Pardee v. Army Force Exchange Service*, 3 BRBS 1130 (1981); *Pernell v. Capital Hill Masonry*, 11 BRBS 532, 539 (1979). The medical expenses are assessable against the employer so long as they are related to the compensable injury.

Regarding recovery of payment for medical services, Section 7(d) of the Act, 33 U.S.C. §907(d), sets forth the prerequisites for an employer’s liability for payment or reimbursement of medical expenses incurred by claimant. The Board has held that Section 7(d) requires that a claimant request his employer’s authorization for medical services performed by any physician, including the claimant’s initial choice. *See Shahady v. Atlas Tile & Marble*, 13 BRBS 1007 (1981) (Miller, J., dissenting), *rev’d on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), cert. denied, 459 U.S. 1146 (1983). Where a claimant’s request for authorization is refused by the employer, claimant is released from the obligation of continuing to seek approval for his subsequent treatment and thereafter need only establish that the treatment he subsequently procured on his own initiative was necessary for his injury in order to be entitled to such treatment at employer’s expense. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The employer bears the burden of establishing that physicians who treated an injured worker

were not authorized to provide treatment under the Act. *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986).

Once a claimant has made his initial, free choice of a physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. Employer is ordinarily not responsible for the payment of medical benefits if a claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53(CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982). Failure to obtain authorization for a change can be excused, however, where the claimant has been effectively refused further medical treatment. *Lloyd*, 725 F.2d at 787, 16 BRBS at 53(CRT); *Swain*, 14 BRBS at 664; *Washington v. Cooper Stevedoring Co.*, 3 BRBS 474 (1976), *aff'd*, 556 F.2d 268, 6 BRBS 324 (5th Cir. 1977); *Buckhaults v. Shippers Stevedore Co.*, 2 BRBS 277 (1975).

An employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C. Cir. 1982) (per curiam), *rev'g* 13 BRBS 1007 (1981), *cert. denied*, 459 U.S. 1146 (1983); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10 (1983); *Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983). Before an employer could be said to have neglected to provide care, there must first have been a request for such care. *Jackson v. Navy Exch. Serv. Center*, 9 BRBS 437 (1978).

Employer argues that it is not liable for the cost of care for Claimant's carpal tunnel because it only learned of Claimant's hand injury from subpoenaing records. (Employers Brief at 18). Employer asserts that there was never any request for medical care, never for a change of physician, and that Claimant never complained to Dr. McIntosh of any hand pain associated with the shoulder injury. Had he done that, Employer argues they would have referred him to a doctor for such. Employer asserts that because Claimant obtained surgery from an unauthorized doctor, it should not be required to pay any medical bills accumulated for treatment of Claimant's carpal tunnel syndrome.

However, there is evidence in the record that Claimant requested Employer's authorization prior to the time asserted by Employer. Claimant argues that he requested Employer provide him with medical care from Dr. Shealy, but this request was ignored. (Claimant's Brief at 11). As evidence, Claimant offers a letter dated October 22, 2003 to Employer's counsel, in which Claimant's counsel wrote:

I am enclosing a copy of medicals that I received this week from Dr. Gerald J. Shealy concerning [Claimant]. As you can see, Dr. Shealy has operated on [Claimant] for carpal tunnel which he believes is related to his July 3, 2002 accident. He has placed him on a five (5) pound lifting restriction which is obviously incompatible with his return to work.

We are requesting temporary total be reinstated retroactive to the date of Dr. Shealy's first exam. Additionally, we are requesting under Section 7 of the Act that the care by Dr. Shealy be approved.

(CX 23).

The parties have stipulated that the physicians authorized by the employer/carrier to treat the claimant are Dr. McIntosh, Dr. Khoury, and Dr. Fechter. (JX 1). Additionally stipulated are the physicians who were authorized to perform Independent Medical Evaluations on the claimant are Dr. Mitchell, Dr. Pacult, and Dr. Duc. (JX 1).

The letter offered as evidence by Claimant makes clear that Claimant did not seek Employer's authorization of care by Dr. Shealy until *after* the carpal tunnel surgery was performed. Thus, Employer was never even given the opportunity to "neglect" to provide the necessary care for Claimant's wrist injury. For Employer to be liable for the treatment associated with the carpal tunnel surgery, Claimant must have first requested authorization *prior* to obtaining the treatment. As Employer notes, Claimant could have complained of hand pain to Dr. McIntosh, who would have then likely referred Claimant to a specialist. However, under these circumstances, even though it has been determined that the Claimant's surgery was a consequence of his 2002 work-related injury, the Employer is not liable for reimbursement of these medical expenses, as the Employer never had the opportunity to authorize or reject the claim before the surgery took place.

Although reimbursement for past medical treatment rendered by Dr. Shealy is denied because of lack of compliance with the requirements of Section 7 of the Act, the Claimant is entitled to future medical benefits as provided by Section 7 of the Act. *Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 15 BRBS 299 (1983). I therefore find and conclude that Claimant is entitled to reimbursement for future reasonable and necessary medical expenses, beginning on October 22, 2003 when Claimant requested authorization of medical treatment, related to Claimant's carpal tunnel syndrome subject to the provisions of Section 7.

Section 7(d) Authorization of Medical Services: Dr. Joye

Claimant additionally failed to properly seek authorization for treatment he received from Dr. Joye, as is required by Section 7 of the Act, and is thus not entitled to reimbursement for this medical care. Dr. Joye evaluated Claimant on July 25, 2003. (CX 10). As documented by a correspondence dated November 11, 2003, Claimant's counsel advised Employer's counsel that:

[Claimant] attempted to see Dr. Greg Khoury, M.D. today for his neck pain. He was informed by Dr. Khoury's office that they can not prescribe medicine for him and that he will need to see somebody else for medical follow-up. Dr. Khoury's office advised [Claimant] that they had seen him only once for a rating, and had released him from their care. They are not willing to see him as a treating patient.

This is to reiterate my request under Section 7 of the Act for follow-up care to be done with Dr. Todd Joye. Please advise whether treatment by Dr. Joye will be approved."

(CX 24).

Though the November 11, 2003, letter appears to assert that an earlier request had been made to authorize Dr. Joye, there is no other affirmative evidence in the record that Claimant

actually sought authorization of treatment before seeking treatment from Dr. Joye prior to November 11, 2003. To reiterate, an employee cannot receive reimbursement for medical expenses under this subsection unless he has first requested authorization, prior to obtaining the treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; *McQuillen*, 16 BRBS at 10; *Jackson v. Ingalls*, 15 BRBS at 299. Thus, Employer is not responsible for the payment of medical benefits from Dr. Joye's treatment prior to November 11, 2003, because Claimant failed to obtain the required authorization

Temporary Total Disability from July 7, 2003 through the present and continuing

It is undisputed that Claimant suffered a shoulder and neck injury on July 3, 2002, and that Claimant was paid temporary total disability benefits through his return to work on July 7, 2003. As discussed above, Claimant's carpal tunnel syndrome is also causally related to his employment with Employer. Because of these injuries, Claimant argues that he remains entitled to temporary total disability benefits from July 7, 2003, to the present and continuing. While Employer agrees that Claimant remains entitled to continuing medical payments for the pain and treatment associated with his neck and shoulder injuries, Employer argues that Claimant is not entitled to temporary total disability benefits after July 7, 2003.

Employer refutes the continuing payment of temporary total disability benefits after July 7, 2003 on two grounds. First, Employer asserts that Claimant's absence from the workplace during this period was due to his suspension from the workplace for his violation of the drug policies of ILA Local Union 1422 and then his subsequent termination for failing to return to work after June 9, 2004 when his permanent suspension had lifted. Employer argues that Claimant voluntarily withdrew himself from the workplace and is thus not entitled to TTD. Secondly, Employer contends that Claimant is not entitled to TTD because Dr. McIntosh and Dr. Khoury had previously released him to return to work the previous year.

Claimant seeks temporary total disability benefits commencing July 6, 2003 through the present and continuing. The burden of proving the nature and extent of disability rests with Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its permanent or temporary nature and its total or partial extent. The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss or a partial loss of wage earning capacity.

In the present case, Claimant seeks temporary disability benefits from July 6, 2003 through the present and continuing. A claimant's disability becomes permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask*, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is

considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984).

Through Claimant was deemed to have reached MMI by Dr. Khoury and Dr. McIntosh, Claimant's current treating physician has yet to reach this conclusion. Claimant presently remains under the care of Dr. Duc, who is currently the only physician treating Claimant for his neck pain resulting from his work-related accident. Though Dr. Duc acknowledged that it is likely that Claimant has reached MMI, Dr. Duc has yet to place Claimant at maximum medical improvement or declare that he is permanently and totally disabled with respect to his neck. As such, Claimant remains temporarily disabled.

To establish a prima facie case of total disability, a claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 200 (4th Cir. 1984); *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Elliott v. C & P Tel. Co.*, 16 BRBS 89, 92 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 342-43 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Eller & Co. v. Golden*, 620 F.2d 71, 74 (5th Cir. 1980); *Ruiz v. Universal Mar. Serv. Corp.*, 8 BRBS 451, 454 (1978). In addition, a claimant's credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991).

Both Claimant's testimony and his medical records establish that Claimant was unable to return to his former employment on July 7, 2003. On May, 29, 2003, Dr. Khoury released Claimant to work with a thirty pound lifting restriction. (CX 5). Claimant testified that he attempted to return to work on July 7, 2003, under the assumption that Employer would provide him work that did not exceed his thirty pound weight restriction. (TR. at 47). Claimant testified that he was unable to return to the position he held that prior to his injuries, as his previous work for Employer often required him to lift more than thirty pounds. (TR. at 45). Claimant explained that he often handled plywood and cross members at the bottom of containers that weighed more than thirty pounds. Claimant also stated that when he was working on the chassis, the wheel that had to be pulled off "weighed like a hundred pounds." (TR. at 46). Claimant further testified that doing brake jobs and changing tires on a tractor trailer required lifting over 30 pounds. (TR. at 46). Mr. Holden agreed that many of Claimant's previous tasks required him to lift more than thirty pounds, thus exceeding his restrictions. (EX 34).

Claimant's medical restrictions made it impossible for him to accomplish many of the responsibilities his pre-injury employment required. Thus, based upon the evidence and Claimant's testimony, I find that Claimant was unable to return to his former job with Employer and therefore has made a prima facie case that he remained totally disabled on July 7, 2003 through the present and continuing.

Suitable Alternate Employment

Claimant has made a prima facie showing that he is totally disabled. Thus, the burden shifts to Employer to show suitable alternate employment. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988); *Trans-State Dredging*, 731 F.2d at 201; *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991) (per curiam). If Employer fails to rebut the prima facie case of total disability, Claimant will be considered totally disabled and entitled to temporary total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332, 334 (1989); *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49, 54 (1988).

To establish suitable alternate employment, the employer must show the existence of realistic job opportunities that the claimant is capable of performing, considering his age, education, work experience, and physical restrictions. *Trans-State Dredging*, 731 F.2d at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)). The job opportunities must be located in the relevant labor market. *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380-81 (4th Cir. 1994) (holding that the employer must show availability of employment in the community in which the claimant presently lives). Further, the employer must show the availability of actual, not theoretical, employment opportunities as well as the nature, terms, and pay scales for the alternate jobs. *Manigault*, 22 BRBS at 334 (citing *Thompson v. Lockheed Shipbuilding Constr. Co.*, 21 BRBS 94, 97 (1988)); *Royce v. Erich Constr. Co.*, 17 BRBS 157, 159 (1985); *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024, 1027 (1978).

The employer also carries the burden of showing the reasonable availability of specific jobs within the job market at critical times. *Universal Mar. Corp. v. Moore*, 126 F.3d 256, 265 (4th Cir. 1997); *Turner*, 661 F.2d at 1043. The Fourth Circuit has interpreted “critical time” to mean the time “during which the claimant was able to seek work.” *Tann*, 841 F.2d at 543. The date on which suitable alternate employment became available is that date upon which Claimant could have realistically secured employment had he made a diligent effort. *Tann*, 841 F.2d at 542; *Trans-State Dredging*, 731 F.2d at 201 (quoting *Turner*, 661 F.2d at 1042-43). The earliest date on which suitable alternate employment becomes available determines the date on which the extent of a claimant’s disability changes, economically and medically speaking, from total to partial disability. *Rinaldi*, 25 BRBS at 130-31 (citing *Director, OWCP v. Berkstresser*, 921 F.2d 306, 312 (D.C. Cir. 1990)). An employer can meet its burden by offering the injured employee a light duty position at its facility, as long as the position does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). If the employer does offer suitable work, the judge need not examine employment opportunities on the open market. *Conover v. Sun Shipbuilding & Dry Dock Co.*, 11 BRBS 676, 679 (1979).

It appears from the evidence in the record that Employer offered Claimant a light duty position, commencing on July 7, 2003. Claimant testified that he was informed that he could return to work on July 6, 2003, and was under the assumption that Employer would provide him work that did not exceed his thirty pound weight restriction. (TR. at 47). However, Claimant’s injuries prevented him from effectively performing in this position. (TR. at 48). Claimant explained that he was given a broom and told to sweep, but he was unable to do so because of the pain. (TR. at 90). Thus, Claimant’s inability to complete a relatively simple task establishes

that this alternate position offered by Employer was unsuitable. Claimant's failure to submit to a drug test on July 7, 2003 is irrelevant as he was punished for this *after* it was discovered that he would be unable to complete the work for Employer. Claimant was unable to perform light duty work offered him on July 7, 2003 because he suffered from pain in his attempt. Therefore, this light duty work is not to be considered suitable alternate employment.

Employer failed to offer suitable work, thus requiring an examination of employment opportunities on the open market. Employer has offered evidence of a labor market survey and testimony of Mr. Jerry George Albert. When referencing the external labor market through a labor market survey to establish suitable alternate employment, an employer must "present evidence that a range of jobs exist." *Lentz v. Cottman Co.*, 852 F.2d 129, 131 (4th Cir. 1988). The employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as "it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job." *Id.* The purpose of a labor market survey is not to find the claimant a job, but to determine whether suitable work is available for which the claimant could realistically compete. The courts have consistently held that the employer is not required to become an employment agent for the claimant. *Tann*, 841 F.2d at 543; *see also Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991). The employer may meet this burden of showing suitable alternate employment by "presenting evidence of jobs which, although no longer open when located, were available during the time claimant was able to work." *Tann*, 841 F.2d at 543.

Mr. Albert has identified the following positions in either his labor market survey, as sent for approval from doctors, or in his testimony:

1. Phone operator position, Target

It is uncertain from the record whether Claimant is educationally qualified for this position. This potential employer stated that it required a high school graduate, but was silent as to whether it would consider an applicant such as Claimant, who possesses a GED. This position was not reasonably available to Claimant and thus is not evidence of suitable alternate employment.

2. Dispatcher, Charleston Marine

Again, the record feeds doubt as to whether Claimant would be educationally qualified for this position. This potential employer was willing to train a high school graduate to use dispatcher radio equipment. (EX 15). Though he possesses a GED, Claimant is not a high school graduate, and it is unclear whether this prospective employer would consider Claimant for this position. I therefore concluded that this position does not constitute suitable alternate employment.

3. Front desk clerk, Holiday Inn Express and Francis Marion hotel

Mr. Albert himself testified that he felt these positions were not appropriate for Claimant because of his low math and reading scores. (TR. at 139). Thus, I find that these positions are not suitable alternate employment for someone with Claimant's education and skills.

4. Dispatcher, Thompson Companies (EX 15).

This position is not consistent with suitable alternate employment for Claimant. Though this potential employer was willing to train new hires, and preferred high school graduates with basic computer knowledge to input information. (EX 15). The evidence is unclear whether Claimant truly would have been a competitive applicant for the position because some computer experience was necessary. There is no evidence that Claimant possessed such knowledge. Claimant is also not a high school graduate, as is preferred by this prospective employer. I therefore find that Employer has failed to sustain its burden in proving that this dispatcher position with Thompson Companies constitutes suitable alternate employment within the physical restrictions placed upon Claimant.

5. Sales associate position, Luxotica/Sunglass Hut (EX 15).

Claimant does not have any sales experience in his employment history, rendering this position insufficient as an example of suitable alternate employment. Additionally, as discussed above, Claimant's low math skills would likely render him incompatible for this sales associate position in which he would be required to deal with the constant flow of money and merchandise that accompanies a sales transaction. Therefore, the sales associate position is not suitable alternate employment.

6. Greeter position, M & M Group Auto Care Express

This position was available on September 2, 2003, and required the employee to greet customers of the car wash. (EX 18). The employer was willing to train non-high school graduates, and this position required very minimal lifting. (TR. at 138). Mr. Albert noted that this position was approved by Dr. Duc, Dr. Quarry and Dr. Pacult. (TR. at 138). Additionally, this job was available during the period of claimed disability and is within Claimant's geographic area. Claimant is capable of performing this position, considering his age, education, work experience, and physical restrictions. Thus, I find that this position is suitable alternate employment.

7. Meter reader, Burmax

This position is not suitable alternate employment because it is unclear from the record the date upon which this position was realistically available and whether it was even available during the period of Claimant's disability. Additionally, this position also fails to comply with Claimant's later restrictions imposed on July 21, 2004, by Dr. Fechter. The job responsibilities of this position include "walking, holding a meter reader that weighs one to two pounds, and

working outdoors in all kinds of weather – cold or hot.” (TR. at 139). Specifically, Dr. Fechter noted that Claimant “must not work around ex: heat, cold, dust, fumes, chemical, etc.” (CX 14). Therefore, this position is not an example of suitable alternate employment for Claimant.

8. Stephens Shipping and Terminal Co. (EX 17).

Claimant lives and works in the Charleston, South Carolina area. This potential employer is located in Savannah, Georgia. This is not suitable alternate employment because these job opportunities are not located in the relevant labor market.

9. Delivery driver, Howard Shepard

Citing to transcript pages 134-135, Employer asserts in its post-hearing brief that Dr. McIntosh approved of this position for Claimant. (Employer’s Brief at 25). However, such evidence is not apparent from those pages, and was unable to be found in the record. Mr. Albert noted that this position was available when Claimant “was getting ready to go back to work,” presumably in July of 2003. This position involved relocating freight containers from the shipyard to a local freight yard, using a Hustler vehicle, which an employee would have to climb two steps to enter. (TR. at 139). However, the record is silent as to whether Claimant would be an acceptable candidate for this position, given his 30-pound restriction. In all likelihood, given the evidence that Claimant was unable to complete a sweeping task for Employer because of pain, this position would not be suitable. Additionally, this position required a candidate with a clean driving record. There is no evidence in the record, other than Mr. Albert’s assertion, of Claimant’s driving record. Further, there is no indication that Mr. Albert considered Claimant’s driving record in formulating this labor market survey. (TR. at 139). Thus, because it is not clear whether Claimant is qualified to work as a delivery driver, this position does not represent suitable alternate employment.

To summarize, the vocational evidence offered by Employer identifies only one position, the greeter position for M & M Group Auto Care Express that can be considered suitable alternate employment. However, Employer cannot satisfy its burden of showing suitable alternate employment by identifying only one job opening, as “it is manifestly unreasonable to conclude that an individual would be able to seek out and, more importantly, secure that specific job.” *Id.* Claimant remained entitled to temporary total disability benefits from July 3, 2003 through the present and continuing.

Section 14(e) Penalty¹¹

¹¹ Citing Section 14(j) of the Act, Employer had asserted in its post-hearing brief that it had overpaid Claimant in disability benefits, and accordingly seeks a credit in the amount of \$11,011.21. Claimant was paid from the date of his injury on July 3, 2002 until July 6, 2003, in the compensation rate of \$666.70, for a total of \$34,954.41. Employer argued that Claimant’s average weekly wage was \$678.76, resulting in a compensation rate of \$452.46. However, the parties stipulated at a post-hearing telephone conference that at the time of his injury, Claimant had an average weekly wage of \$1,327.84 per week which would yield a compensation rate of \$885.23. (JX 2). Because Claimant was actually paid less than that to which he was entitled, Employer is not entitled to a credit under Section 14(j) of the Act. *Stevedoring Servs. of America v. Eggert*, 953 F.2d 552, 556, 25 BRBS 92, 97(CRT) (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992); *Tibbetts v. Bath Iron Works Corp.*, 10 BRBS 245, 249 (1979) *Nichols v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 710, 712 (1978)

Section 14(e) provides:

(e) If any installment of compensation payable without an award is not paid within fourteen days after it become due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

In order to avoid this penalty, the Employer must either pay the correct compensation, controvert liability or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). Moreover, the assessment of this penalty is mandatory under Section 14(e). An Employer's good faith is not relevant under Section 14(e). *Director, OWCP v. Cooper Assoc., Inc.* 607 F. 2d 1385, 1389 (D.C. Cir. 1979). In addition, an employer may escape this penalty if it can show that either its failure to make timely payment or file a timely Controversion were due to circumstances beyond its control. *Gulley v. Ingalls Shipbuilding*, 22 BRBS 262, 266 (1989), *aff'd in part, part sub nom. Ingalls Shipbuilding v. Director, OWCP*, 898 F.2d 1088 (5th Cir. 1990).

Where an employer pays some compensation voluntarily, fails to controvert the remainder, and claimant is then awarded compensation in an amount greater than that which the employer voluntarily paid, employer's liability under § 14(e) is based solely on the difference. *National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288, 1295 (CA9 1979), *remanding in pertinent part* 5 BRBS 290 (1977); *Chandler v. Newport News Shipbuilding and Dry Dock Co.*, 8 BRBS 293 (1978).

In this case, the parties have stipulated Employer has paid disability payments to the claimant from the date of his injury on July 3, 2002 until July 6, 2003 when an LS207 was filed. (JX 1). Specifically, Claimant was paid "temporary total" disability benefits from the date of his injury on July 3, 2002 until July 6, 2003, in the compensation rate of \$666.70, for a total of \$34,954.41. (CX 21). However, the parties stipulated at a post-hearing telephone conference that at the time of his injury, Claimant had an average weekly wage of \$1,327.84 per week which would yield a compensation rate of \$885.23. (JX 2). As the amounts voluntarily paid by Employer were less than that found to be due, Claimant is entitled to a Section 14(e) penalty on the amount he was underpaid. Thus, Employer is liable for a Section 14(e) penalty on the difference between the payments that were actually paid to Claimant and the payments to which Claimant was entitled during the period of July 3, 2002 through July 6, 2003.

ORDER

Accordingly, it is hereby ordered that:

1. Employer, Coastal Great Southern, is hereby ordered to pay to Claimant, Benjamin Robinson, compensation for temporary total disability from July

- 3, 2002 through the present and continuing, inclusive, at the stipulated compensation rate of \$885.23;
2. Pursuant to §14(e), Employer is ordered to pay 10% penalty on the difference between the payments that were actually paid to Claimant and the payments to which Claimant was entitled during the period of July 3, 2002 through July 6, 2003;
 3. Employer shall pay for all future necessary and reasonable medical treatment as required for Claimant's neck, right shoulder and hand work-related conditions;
 4. Although reimbursement for past medical treatment rendered by Dr. Shealy is denied because of lack of compliance with the requirements of Section 7 of the Act, Claimant is entitled to any future medical benefits stemming from his carpal tunnel as provided by Section 7 of the Act;
 5. Employer shall receive credit for any compensation already paid;
 6. Claimant's claim for compensation due to occupational bronchitis and asthma is denied;
 7. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); and
 8. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

A

RICHARD E. HUDDLESTON
Administrative Law Judge